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# Ne Exeat Clauses Proven Ineffective: How the Hague Convention Renders Access Rights Illusory

## **Cover Page Footnote**

International Law; Commercial Law; Law

# ***Ne Exeat* Clauses Proven Ineffective: How the Hague Convention Renders Access Rights Illusory**

## **I. Introduction**

On February 28, 2001, Rosa Teresa Gutierrez, a Mexican citizen, told her ex-husband, Eduardo Arce Gonzalez, also a Mexican citizen, that she planned to take their two children, Maria and Eduardo, on a one-week vacation.<sup>1</sup> In accordance with the “*ne exeat*” clause<sup>2</sup> of the couple’s divorce agreement, Gutierrez agreed that she would not take the children outside of Mexico without Gonzalez’s permission.<sup>3</sup> On March 8, after the vacation, Gonzales was unable to locate Gutierrez and his children.<sup>4</sup> He later discovered that, in defiance of the *ne exeat* clause, Gutierrez had taken Maria and Eduardo to live with Gutierrez’s sister, who was now a permanent U.S. resident living in San Diego.<sup>5</sup>

Gonzalez sought the return of his children to Mexico<sup>6</sup> pursuant to the Hague Convention on the Civil Aspects of International Child Abduction, which is implemented by the International Child Abduction Remedies Act (ICARA).<sup>7</sup> The Convention purports to “establish[] legal rights and procedures for the prompt return of children who have been wrongfully removed or retained, as well as for securing the exercise of visitation rights.”<sup>8</sup> The court held that, because Gonzalez did not have the right of custody over his children, and simply held visitation rights, he could not compel their return under ICARA.<sup>9</sup>

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<sup>1</sup> Gonzalez v. Gutierrez, 311 F.3d 942, 947 (9th Cir. 2002).

<sup>2</sup> The court defines a *ne exeat* clause as a “writ which forbids the person to whom it is addressed to leave the country, the state, or the jurisdiction of the court.” *Id.* at 947 n.8 (citing BLACK’S LAW DICTIONARY 1031 (6th ed. 1990)).

<sup>3</sup> Gonzalez, 311 F.3d at 947.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.* at 942.

<sup>7</sup> 42 U.S.C. §§ 11601-11610 (2002).

<sup>8</sup> 42 U.S.C. § 11601(a)(4) (2002).

<sup>9</sup> Gonzalez, 311 F.3d at 949.

The Ninth Circuit, by refusing to honor the *ne exeat* clause of a divorce agreement under ICARA, removes a means of protection for parents with visitation rights who are concerned that the custodial parent may move the children to another country.<sup>10</sup> While the Ninth Circuit's distinction between custodial rights and access rights<sup>11</sup> is not controversial in its conformity to precedent, it is demonstrative of what many consider to be the biggest failure of the Act – its refusal to provide a remedy for parents who hold visitation rights to their children.<sup>12</sup>

This note will explore the facts and holding of *Gonzales v. Gutierrez* in Part II. Part III will examine the background law, focusing on the Convention and interpretations of it, and part IV will provide an analysis of the court's opinion. Finally, in Part V, this note will conclude that the majority of both United States and foreign courts, in their current interpretation of the Convention and treatment of claims, frustrate the Convention's central purpose.

## II. Statement of the Case

### A. Facts

On December 18, 1992, Eduardo Arce Gonzalez married Rosa Teresa Gutierrez in Guadalajara, Mexico.<sup>13</sup> They had two children: Maria, born in 1993, and Eduardo, born in 1997.<sup>14</sup> The marriage was not a happy one, and Gutierrez claimed to be a victim of Gonzalez's physical, emotional, and sexual abuse during their marriage and the separation that followed.<sup>15</sup> Reached in

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<sup>10</sup> *Id.* at 948-49.

<sup>11</sup> *Id.* (quoting Article 5 of the Hague International Child Abduction Convention, 51 Fed. Reg. 10494 (Mar. 26, 1986) [hereinafter Convention]) (“[R]ights of access’ shall include the right to take a child for a limited period of time to a place other than the child’s habitual residence.”).

<sup>12</sup> See *Bromley v. Bromley*, 30 F. Supp. 2d 857, 860-61 (E.D.Pa. 1998) (“In the United Kingdom, Article 21 has been described as toothless because it fails to confer jurisdiction on the British courts to determine matters relating to access.”).

<sup>13</sup> *Gonzalez*, 311 F.3d at 945-46.

<sup>14</sup> *Id.* at 946.

<sup>15</sup> *Id.* Susana Galarza, Gutierrez’s sister, testified that, while she shared a house with the family over a period of years, Gonzalez would often come home drunk and behave in an “aggressive manner” toward the family. *Id.* After the separation in November 1998, Gonzalez physically assaulted Gutierrez in the presence of three-year-old Eduardo. *Id.*

August 2000, the couple's divorce agreement<sup>16</sup> set out their parental rights.<sup>17</sup>

The divorce agreement provided that both Maria and Eduardo would remain in custody of their mother.<sup>18</sup> Gonzalez was given visitation rights and was allowed to see Maria and Eduardo on Monday, Wednesday, and Friday from 2 p.m. to 5 p.m. every week.<sup>19</sup> He was also given the right to have the children every other weekend and for vacation two weeks each year.<sup>20</sup> The final paragraph of the agreement, which compromises the "*ne exeat*" clause, pronounced that Gonzalez must "grant full authorization according to law, until [Maria and Eduardo] reach adult age, on every occasion that his minor children . . . seek to leave the country accompanied by their mother . . . or any other person."<sup>21</sup> Both parties stipulated that the paragraph was to "be construed as prohibiting Gutierrez from taking the children out of the country without [Gonzalez's] permission."<sup>22</sup>

Despite the *ne exeat* clause, Gutierrez, under the guise of taking the children on a vacation in Mexico, moved Maria and Eduardo to the United States in order to live with her sister in San Diego.<sup>23</sup> Gonzalez attempted to see his children on the day they were to return from vacation. Upon being unable to locate the children, he eventually learned that Gutierrez had moved them to the United States.<sup>24</sup>

### *B. Procedural History*

On October 18, 2001, the District Attorney's Office of San

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<sup>16</sup> *Id.* The couple filed for a mutual consent divorce petition. *Id.* Gutierrez initially sought a fault-based divorce because of the abuse she had suffered. *Id.* She claims that she later agreed to the mutual consent divorce because she was informed that a fault-based divorce might take up to five years to resolve and she was concerned about obtaining "immediate protection" from Gonzalez. *Id.*

<sup>17</sup> *Id.* at 946-47.

<sup>18</sup> *Id.* at 946. The divorce agreement also specified that the children and Gutierrez would live at 1635-b Francia Street in Guadalajara. *Id.*

<sup>19</sup> *Id.* at 947.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

Diego County filed a Petition for the return of Children to Mexico and sought the return of Maria and Eduardo under ICARA.<sup>25</sup> The district court decided that the children had been “wrongfully removed” in violation of Gonzalez’s custody rights under the Convention.<sup>26</sup> Furthermore, it concluded that Gutierrez “had failed to establish any affirmative defenses that would prevent their return.”<sup>27</sup> The district court ordered the children to be returned to Mexico.<sup>28</sup> On appeal, the Ninth Circuit reversed, holding that “the *ne exeat* clause in a foreign divorce agreement does not confer ‘rights of custody’ upon a parent who otherwise possesses only access rights to parties’ children.”<sup>29</sup>

### C. Ninth Circuit’s Review

In considering the district court’s decision regarding the Convention, the Ninth Circuit reviewed findings of fact for “clear error” and conclusions of law *de novo*.<sup>30</sup> The court, in interpreting the treaty, “begin[s] with the text” but also “look[s] beyond the written words.”<sup>31</sup> The court states that it will consider the purposes, drafting history, and post-ratification understanding of the treaty.<sup>32</sup>

The Court first must decide what effect, if any, the *ne exeat* clause has on Gonzalez’s custody rights.<sup>33</sup> Gonzalez argues that

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<sup>25</sup> *Id.* Gutierrez removed the action to federal district court. *Id.* Gonzalez also argued that the Mexican legal concept of *patria potestas* gives him the right of custody under the Convention. *Id.* “*Patria potestas*” is “derived from Roman law and originally meant paternal power over the family and household.” *Id.* at 952.

<sup>26</sup> *Id.* at 947.

<sup>27</sup> *Id.* at 948 n.11 (The Ninth Circuit Court of Appeals based its decision on the issue of Gonzalez’s rights under the Convention, so it does not consider other issues raised on appeal by Gutierrez, specifically, the district court’s denial of her affirmative defenses).

<sup>28</sup> *Id.* at 947.

<sup>29</sup> *Id.* at 942.

<sup>30</sup> *Id.* at 948 (citing *Shalit v. Coppe*, 182 F.3d 1124, 1127 (9th Cir. 1999)). A *de novo* review is one in which “the appellate court uses the trial court’s record but reviews the evidence and law without deference to the trial court’s rulings.” BLACK’S LAW DICTIONARY 94 (7th ed. 1999).

<sup>31</sup> *Gonzalez*, 311 F.3d at 948 (citing *Eastern Airlines, Inc. v. Floyd*, 499 U.S. 530, 534-35 (1991)).

<sup>32</sup> *Id.*; see *El Al Israel Airlines, Ltd. v. Tseng*, 525 U.S. 155, 167-76 (1999).

<sup>33</sup> *Gonzalez*, 311 F.3d at 948.

he has custodial rights, as recognized by the Convention, because the *ne exeat* clause of his divorce agreement confers the right to decide where his children reside.<sup>34</sup> Rejecting his assertion of custody rights, the Court holds that the “right” conferred by a *ne exeat* clause is, “at most, a veto power.”<sup>35</sup>

The court holds that Gutierrez, because she has custody of the children, has the “affirmative right to determine the country, city, and precise location where the child will live.”<sup>36</sup> Gonzalez, as a parent with only access rights, by virtue of the *ne exeat* clause, can only impose a limitation on Gutierrez’s right to expatriate his children, and at the very most, could refuse permission for his children to leave Mexico.<sup>37</sup>

Deciding that the *ne exeat* clause does not confer *custodial* rights upon Gonzalez, the Court next had to determine what remedies were available to him based on his *access* rights.<sup>38</sup> The court interpreted the Convention as making a distinction between access rights, custody rights, and the remedies available to parties holding either.<sup>39</sup> According to the court’s interpretation, a party who violates another’s custodial rights may be forced to return the children, but a parent who violates another’s access rights will not have this same obligation.<sup>40</sup> The court holds that “not *all* parental disputes warrant direct intervention by courts of the State to which children are taken” and concludes that the Convention allows the remedy of return “only for the parent with the superior rights.”<sup>41</sup>

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<sup>34</sup> *Id.*

<sup>35</sup> *Id.* at 949.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* The court concludes that the *ne exeat* clause is “merely a condition designed to protect [Gonzalez’s] access rights, and no more.” *Id.* at 950. The court does not explain how Gonzalez can effectuate a refusal or how the *ne exeat* clause actually protects Gonzalez’s access rights since the court’s decision results in the children remaining in the United States, practically assuring Gonzalez that he will have *no* access to his children. *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at 951-52.

<sup>40</sup> *Id.* at 949. Under the text of the Convention, access rights, while protected under the Convention, are protected to a lesser extent than custody rights. *Id.* The text further states that the remedies for breach of access rights do not include the return remedy provided by Article 12. *Id.*

<sup>41</sup> *Id.* at 950.

Finally, the court specifically cites Article 21 of the Convention, which provides remedies for parties holding access rights, and points out that this Article does not provide for the return of children as a remedy for violation of access rights.<sup>42</sup>

The court concedes that one of the purposes of the Convention is to "secure protection for rights of access."<sup>43</sup> However, the court justifies its holding<sup>44</sup> by contending that it is simply comporting with the treaty's "larger purposes" of protecting children from wrongful removal.<sup>45</sup>

### III. Background Law

The Hague Convention on the Civil Aspects of International Child Abduction<sup>46</sup> is an international treaty with fifty signatory countries.<sup>47</sup> The United States became subject to the treaty upon its ratification in 1980.<sup>48</sup> Under U.S. law, "the convention is implemented by the International Child Abduction Remedies Act (ICARA)."<sup>49</sup> Part III will focus on the text, judicial interpretation, and evolution of the Convention, as implemented by ICARA.

#### A. Text

Congress recognizes that "international abduction of children is harmful to their well-being."<sup>50</sup> One of its motivations in enacting ICARA is the fact that international abductions are

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<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> The court admits that its holding will likely result in Gonzalez and his children seeing much less of each other. *Id.* at 951.

<sup>45</sup> *Id.*

<sup>46</sup> "Abduction," for the purposes of the Convention, is not meant in a criminal sense. Convention, *supra* note 11, at 10503. Instead, it is intended to refer to the "wrongful removal or retention" of a child. *Gonzalez*, 311 F.3d at 950. "Wrongful removal" refers to "the taking of a child from the person who was actually exercising custody of the child." *Id.* "Wrongful retention" refers to the act of keeping the child "without the consent of the person who was actually exercising custody." *Id.*

<sup>47</sup> *Gonzalez*, 311 F.3d at 944.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> 42 U.S.C. § 11601(a)(1) (2002). While recognizing that the child is the "ultimate beneficiary of the Convention's judicial and administrative machinery," it concedes that the child's role is passive. Convention, *supra* note 11, at 10505.



increasing, and only “concerted cooperation pursuant to an international agreement” can effectively resolve this problem.<sup>51</sup> Congress’s purpose in implementing the convention under ICARA is to “establish legal rights and procedures for the prompt return of children who have been wrongfully removed or retained, as well as for *securing the exercise of visitation rights*.”<sup>52</sup> If the problem of international child abduction is to be combated effectively, uniform international interpretation of the convention is needed.<sup>53</sup>

The Convention aims to protect children from wrongful removals because “[c]hildren who are wrongfully moved from country to country are deprived of the stable relationships which the Convention is designed promptly to restore.”<sup>54</sup> The Convention is applicable only to children who are under the age of sixteen, and applies only when both countries are signatory parties.<sup>55</sup>

According to Article III of the Act, a parent seeking the return of his or her child should petition a court in the contracting state to which the child has been taken for the child’s return.<sup>56</sup> The petitioner must show that: 1) the child was “habitually resident” in the jurisdiction immediately before removal; 2) removal was in breach of rights of custody of the person, an institution, or any other body; and 3) those rights were actually exercised at the time of removal or would have been so exercised in absence of his removal.<sup>57</sup> The petition should state the source of the custody rights.<sup>58</sup> The Convention identifies three sources of custody

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<sup>51</sup> 42 U.S.C. § 11601(a)(3) (2002).

<sup>52</sup> 42 U.S.C. § 11601(a)(4) (2002) (emphasis added). Although the Convention claims to aim to secure visitation rights, it also illustrates the “typical scenario” as involving one parent taking their child from one country to another over the objections of the parent with custody rights. Convention, *supra* note 11, at 10505.

<sup>53</sup> 42 U.S.C. § 11601(b)(3)(B) (2002).

<sup>54</sup> Convention, *supra* note 11, at 10504.

<sup>55</sup> *Id.* The Convention applies only where the country from which the child was taken, and the country to which the child was taken, are both parties to the Convention. *Id.* The Convention was entered into force between Mexico and the United States in 1991. *Gonzalez v. Gutierrez*, 311 F.3d 942, 944 n.2 (9th Cir. 2002).

<sup>56</sup> Convention, *supra* note 11, at 10507.

<sup>57</sup> *Fawcett v. McRoberts*, 168 F. Supp. 2d 595, 600 (W.D. Va. 2001).

<sup>58</sup> Convention, *supra* note 11, at 10508. “Custody rights” are defined in Article 5(a) as “rights relating to the care of the person of the child and, in particular, the right to

rights.<sup>59</sup> According to the Convention, custody rights may result from: 1) operation of law;<sup>60</sup> 2) a judicial or administrative decision;<sup>61</sup> or 3) an agreement having legal effect under the law of that State.<sup>62</sup>

The cornerstone of the Convention is the issue of wrongful removal or retention.<sup>63</sup> One of the major questions surrounding this issue is the question of who holds rights protected by the Convention.<sup>64</sup> The Convention is careful to point out that biological parents are not the only ones who might hold rights protected by the Convention.<sup>65</sup> For example, the Convention details many situations in which someone, other than a biological parent, has been exercising custody of a child.<sup>66</sup> The Convention states that both grandparents and foster families are able to invoke the Convention in order to compel the child's return if they have been exercising custody rights over a child and these rights are breached by a biological parent.<sup>67</sup> The Convention justifies this rule by pointing out that "a family relationship existed between the

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determine the child's place of residence." *Id.* at 10506. The petition should also state the date of the wrongful conduct and the child's age at that time. *Id.* at 10508.

<sup>59</sup> *Id.* at 10506.

<sup>60</sup> Custody rights, if they arise by operation of law in the state from which the child is taken, are protected and "need not be conferred by court order to fall within the scope of the [C]onvention." *Id.* For example, a person whose child is taken from his or her habitual residence before a custody order is entered does not have to obtain this custody order as a prerequisite to being covered by the Convention.

<sup>61</sup> The Convention warns that this language can be deceiving because, technically, the Convention does not automatically order recognition and enforcement of the judicial or administrative decision. *Id.* at 10507. Instead, it aims to restore the actual custody arrangements that "existed prior to the wrongful removal or retention." *Id.* In other words, just because you have a judicial decision granting you visitation rights does not mean that, under the Convention, you can get your child returned if your child, under actual custody arrangements was not under your care.

<sup>62</sup> *Id.* The Convention explains that parties who have a private agreement regarding their child's custody can seek relief under the Convention. *Id.* However, the agreement must have legal effect under the law of the child's habitual residence, and must incorporate more than a routine custody judgment. *Id.*

<sup>63</sup> *Id.* at 10505.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> *Id.* at 10505-06.

<sup>67</sup> *Id.*

victim-child and the person who had the right to seek the child's return."<sup>68</sup> However, the Convention goes one step further, allowing both public and private institutions, such as child care agencies, the right to invoke the Convention if they, in fact, have custody rights which are breached.<sup>69</sup>

Assuming that a petitioner is able to establish that he or she has custody rights, and that the defendant has breached these custody rights by wrongfully removing the child from the child's country of habitual residence, the return of the child to the petitioner is not guaranteed.<sup>70</sup> A parent found to have wrongfully removed a child from his or her country of habitual residence may defend on grounds that: 1) there is a grave risk that returning the child would expose him or her to physical or psychological harm or otherwise place him or her in an intolerable situation;<sup>71</sup> 2) the return would not be permitted by fundamental principles of the United States relating to protection of human rights and fundamental freedoms;<sup>72</sup> 3) the petition for return was not brought within one year of the abduction and the child is well-settled in a new home;<sup>73</sup> or 4) the person petitioning for return of the child was not actually exercising custody rights when the child was removed, or that person had consented or acquiesced in the removal.<sup>74</sup>

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<sup>68</sup> *Id.* at 10506.

<sup>69</sup> *Id.* The Convention gives the example of a natural parent giving away his or her parental rights to a child who is subsequently placed in the care of an adoption agency. *Id.* If the child was later abducted by his or her parents, the adoption agency could seek relief under the language of the Convention. *Id.*

<sup>70</sup> *See id.* at 10509-10.

<sup>71</sup> *Id.* at 10510. The person opposing the child's return has the burden of proving that the risk to the child is grave, not merely serious. *Id.* The Convention further elaborates that the "intolerable situation" was not meant to encompass a return to a home with financial difficulties or where educational opportunities are more limited than in the country where the child was taken. *Id.* An example of an "intolerable situation" would be a custodial parent sexually abusing the child. *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* at 10509. The Convention elaborates that a child's preference should be taken into account assuming the child has reached an age or degree of maturity. *Id.* However, the Convention does not make this exception mandatory due to the danger of the possibility of the alleged abductor "brainwashing" the child. *Id.* at 10510.

<sup>74</sup> *Id.* The person opposing the return has the burden of proving that custody rights were not actually exercised at the time of the removal or retention. *Id.*

Up to this point, the text of the Convention has dealt strictly with remedies available to parents who hold custody rights.<sup>75</sup> What remedies are available to parents who only hold visitation or access rights?<sup>76</sup> The Convention claims that access rights are also protected by the Convention, "but to a lesser extent than custody rights."<sup>77</sup> The Convention even concedes that while its preamble states the objective of protecting access rights, the Convention does not extend the remedy of return to persons holding only access rights.<sup>78</sup> The contradictions which exist between the language of the Convention and its interpretation regarding the treatment of persons holding access rights, have been the subject of several adjudications worldwide.

### *B. Judicial Interpretation*

#### *1. Ne Exeat Clauses*

The Ninth Circuit Court of Appeals decided *Gonzalez v. Gutierrez* as a case of first impression.<sup>79</sup> The only other U.S. circuit court to have decided the effect of a *ne exeat* clause on custody rights for purposes of the Convention was the Second Circuit in *Croll v. Croll*.<sup>80</sup>

The facts of *Croll* are as follows: Stephen and Mei Yee Croll, both American citizens, were married in Hong Kong in 1982.<sup>81</sup> Their daughter, Christina, was born in Hong Kong in 1990, and remained in Hong Kong after her parents separated and commenced divorce proceedings.<sup>82</sup> The Crolls' divorce agreement granted Mei sole "custody, care, and control" of Christina.<sup>83</sup> Stephen Croll was given a right of "reasonable access."<sup>84</sup> The

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<sup>75</sup> *Id.* at 10513.

<sup>76</sup> "Access rights" are defined as the right "to take a child for a limited period of time to a place other than the child's habitual residence." *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*; *Gonzalez*, 311 F.3d at 944.

<sup>80</sup> *Croll v. Croll*, 229 F.3d 133 (2d Cir. 2000).

<sup>81</sup> *Id.* at 135.

<sup>82</sup> *Id.*

<sup>83</sup> *Id.* at 134.

<sup>84</sup> *Id.*

divorce agreement contained a separate paragraph that mandated that Christina “not be removed from Hong Kong until she attains the age of 18 years” unless her father or the court consented.<sup>85</sup> On April 2, 1999, Mrs. Croll took Christina to New York, where she filed an action seeking custody, child support, and an order of protection.<sup>86</sup>

After Mr. Croll petitioned for Christina’s return, the court had to decide whether Mr. Croll held rights of custody under the Convention.<sup>87</sup> The court began by distinguishing custody rights from access rights, holding that if Mr. Croll has custody rights, the United States can order Christina to be returned, but if he only holds access rights, “jurisdiction is lacking and Mr. Croll must rely on other remedies.”<sup>88</sup> The court held that if it were to order the return of a child to a parent holding access rights, pursuant to a *ne exeat* clause, the Convention would become unworkable.<sup>89</sup> The court also held that the purpose of the Convention is to return a child to a custodial parent who will *care* for the child.<sup>90</sup> The Convention does not purport to return a child to a parent whose “sole right-to visit . . . imposes no duty to give care.”<sup>91</sup>

Not all foreign courts have construed *ne exeat* clauses within divorce agreements as simply protecting custodial rights, as the United States courts have. In *C v. C*, a child, Thomas (“T”), was

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<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Id.* at 136.

<sup>89</sup> *Id.* at 140.

<sup>90</sup> *Id.*

<sup>91</sup> *Id.* In *Thompson v. Thomson*, the Supreme Court of Canada decided that a *ne exeat* clause pursuant to an *interim* custody order did constitute rights of custody under the Convention. [1994] 119 D.L.R. (4th) 253, 589. However, Justice La Forest qualified the court’s decision, stating:

I would not wish to be understood as saying the approach should be the same in a situation where a court inserts a non-removal clause in a permanent order of custody. Such a clause raises quite different issues. It is usually intended to ensure permanent access to the non-custodial parent. The right of access is, of course, important but, as we have seen, it was not intended to be given the same level of protection by the Convention as custody.

*Id.*

born in Australia to an English mother and Australian father.<sup>92</sup> The three lived in Australia until the couple divorced in 1986.<sup>93</sup> The deputy registrar in Sydney gave the mother custody of T, and the second clause of the consent order mandated that "neither party should remove the child from Australia without the consent of the other."<sup>94</sup> When the mother took T to live with her in England, the father applied to the High Court in England.<sup>95</sup> The court held that: 1) the definition of 'custody' in Article 5 of the Convention was capable of a wider meaning than the ordinarily understood, domestic concept of custody; 2) even though the father's right to ensure that T remained in Australia was general and not exclusive, it amounted to a right of custody; and 3) the removal of T from Australia without his father's consent was a wrongful removal within the meaning of the Convention.<sup>96</sup>

## 2. *Rights of Custody Versus Access Rights*

Since the Convention's enactment in 1980, there appears to be no clear consensus on how to treat the Convention's distinction between custody rights and access rights.<sup>97</sup> The Convention itself is contradictory regarding these rights and provides little guidance in resolving the problem. For example, its preamble states that one of its purposes is "to protect children internationally from the harmful effect of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence, as well as to *secure protection for rights of access*."<sup>98</sup> Yet, in Article 5, the Convention specifically states that remedies for the breach of access rights do not include the return remedy.<sup>99</sup>

In Article 21, the Convention "authorizes a person complaining of, or seeking to prevent, a breach of access rights to

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<sup>92</sup> C. v. C., (1989) 2 All E.R. 465, 466.

<sup>93</sup> *Id.* at 466-67.

<sup>94</sup> *Id.* at 467.

<sup>95</sup> *Id.* at 465.

<sup>96</sup> See *id.* at 465. In *Dellabarca v. Christie*, the court held that a father with access rights held rights of custody for purposes of the Convention. [1999] N.Z.L.R. 97.

<sup>97</sup> See *Gonzalez v. Gutierrez*, 311 F.3d 942, 952 (9th Cir. 2002).

<sup>98</sup> *David S. v. Zamira S.*, 151 Misc. 2d 630, 633 (N.Y. Fam. Ct. 1991).

<sup>99</sup> See Convention, *supra* note 11, at 10513.

apply to the [central authority] of a contracting state. . . .”<sup>100</sup> Most jurisdictions, however, have interpreted the Convention as refusing a *judicial* remedy to parents possessing only access rights.<sup>101</sup> The different interpretations adopted by jurisdictions regarding the appropriate treatment of access rights are illustrated by the following two cases.

In *Viragh v. Foldes*, Petitioner Gabor argued that Respondent Maria violated his access rights by leaving Hungary with his child, without having obtained his permission.<sup>102</sup> According to the court, the only issue they had to consider was “Gabor’s access rights under the Convention.”<sup>103</sup> The court held:

[T]he Convention does not mandate any specific remedy when a noncustodial parent has established interference with rights of access. Rather, nations are instructed in [Article] 21 to ‘promote the peaceful enjoyment of access rights and the fulfillment of any conditions to which the exercise of those rights may be subject,’ as well as to ‘take steps to remove, as far as possible, all obstacles to the exercise of such rights.’<sup>104</sup>

The court in *Janakakis-Kostun v. Janakakis* took a different approach in regards to the remedies that are available for breach of parental access rights.<sup>105</sup> In *Janakakis*, the petitioner, Emmanuel, a captain in the Greek Navy, married Gia, a member of the U.S. Navy.<sup>106</sup> Gia moved to Greece to marry Emmanuel and the couple had one daughter, Bronte.<sup>107</sup> The couple divorced, and Gia

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<sup>100</sup> *Id.* The Central authority in the United States is the Department of State’s Office of Citizens Consular Services within its Bureau of Consular Affairs. *Id.* at 10511.

<sup>101</sup> *Gonzalez*, 311 F.3d at 949. See *Fernandez v. Yeager*, 121 F. Supp. 2d 1118, 1118 (W.D. Mich. 2000) (holding that federal courts lack jurisdiction to enforce rights of access under Convention); *Bromley v. Bromley*, 30 F. Supp. 2d 857, 860 (E.D. Pa. 1998) (holding that the “plain language of [the] Convention does not provide federal courts with jurisdiction over access rights”).

<sup>102</sup> *Viragh v. Foldes*, 612 N.E.2d 241, 243 (Mass. 1993).

<sup>103</sup> *Id.* at 246.

<sup>104</sup> *Id.* at 247. The court admitted that Gabor’s access rights were likely to be defeated in the current case because of his financial situation and justified their decision to refuse remedy on the fact that Gabor had a reputation as an abusive husband. *Id.*

<sup>105</sup> See *Janakakis-Kostun v. Janakakis*, 6 S.W.3d 843, 850-52 (Ky. Ct. App. 1999).

<sup>106</sup> *Id.* at 845.

<sup>107</sup> *Id.* Bronte was born in Chania, Greece, on the Island of Crete. *Id.*

received custody of Bronte.<sup>108</sup> Despite a court order prohibiting the removal of Bronte from Greece,<sup>109</sup> Gia and Bronte, with the help of Gia's father, were smuggled out of the country to the United States.<sup>110</sup>

Upon Emmanuel's petition for relief, the court held that Bronte was to be returned to Greece and to her father, even though Gia had custody of the child and Emmanuel only had access rights.<sup>111</sup> The court, acknowledging precedent,<sup>112</sup> held that visitation rights may not always equate to custodial rights.<sup>113</sup> However, the court determined that such a distinction was meritless "where a respondent, *i.e.*, the removing parent, engaged in 'contemptuous conduct' in removing the child from its habitual residence."<sup>114</sup>

The cases examined under Part III serve to illustrate the difficulty the courts have had in coming to a consensus regarding both the function of a *ne exeat* clause under the Convention and the overriding concern of the remedies that should be afforded to a parent whose access rights are frustrated by the removal of his or her child to another country.

### C. Evolution of Convention

In *Gonzalez*, the court points out that the Convention gives them little guidance as to how to interpret the effect of a *ne exeat* clause on a parent's custodial rights.<sup>115</sup> The court explains that on

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<sup>108</sup> *Id.* at 846.

<sup>109</sup> Emmanuel sought a court order prohibiting Bronte's removal after Gia had threatened him several times that she was going to leave Greece with Bronte. *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> *Id.* at 847.

<sup>112</sup> See *id.* at 849 (citing *Davis S. v. Zamira*, 151 Misc. 2d 630 (N.Y. Fam. Ct. 1991)).

<sup>113</sup> *Id.*

<sup>114</sup> *Id.* See also *Zamira*, where the court held that respondent's argument that petitioner only holds access rights "might have some merit" but for the respondent's contemptuous conduct. 151 Misc. 2d at 635. See also *Fawcett v. McRoberts* where the court, citing *Croll*, criticizes that court's refusal to afford a remedy under the *ne exeat* clause, stating, "[i]n my view, the majority seriously misconceives the legal import of the *ne exeat* clause, and in so doing, undermines [the goal of ensuring that rights of custody and of access under the law are effectively respected]. 168 F. Supp. 2d 595, 606 (W.D. Va. 2001).

<sup>115</sup> *Gonzalez*, 311 F.3d at 952.



October 19, 1996, the delegates of the then thirty-five member states of the Convention adopted the *Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in Respect of Parental Responsibility and Measures for the Protection of Children*,<sup>116</sup> in an “effort to reform the then current system.”<sup>117</sup> The court further explains that, as to whether federal courts can supply a remedy for parents holding access rights, the language of Article 7 of the 1996 Convention is identical to the language of Article 5 of the 1980 Convention, and “thus creates the same distinctions between rights of custody and rights of access.”<sup>118</sup> Again, parents with custodial rights can move for the mandated return of their children to the country of their habitual residence, but parents with access rights are denied this remedy.<sup>119</sup>

#### IV. Significance of the Case

*Gonzalez v. Gutierrez* is demonstrative of several problems and inconsistencies plaguing the Hague Convention on the Civil Aspects of International Child Abduction, as implemented by the International Child Abduction Remedies Act (ICARA). The Court in *Gonzalez* holds that: 1) parental access rights, alone, are not sufficient to warrant the compelled return of children to their country of habitual residence; and 2) the *ne exeat* clause in a foreign divorce decree does not confer custody rights to a parent otherwise holding access rights for the purposes of the Convention.<sup>120</sup> The Court’s interpretation of the Convention leads to further problems and inconsistencies concerning *ne exeat* clauses: uniformity, children’s interests, and court discretion.

##### A. *Ne Exeat* Clauses

As stated earlier, there seems to be no general consensus regarding what effect a *ne exeat* clause in a divorce decree should have on a party’s custodial rights. The only two U.S. courts to deliberate on the matter held that *ne exeat* clauses do not confer

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<sup>116</sup> 35 I.L.M. 1391.

<sup>117</sup> *Gonzalez*, 311 F.3d at 953.

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> *Id.* at 954.

custodial rights.<sup>121</sup> Yet, other jurisdictions are just as adamant that *ne exeat* clauses *should* confer custodial rights as defined under the Convention.<sup>122</sup> In *Thompson v. Thompson*, the Supreme Court of Canada held that a *ne exeat* clause contained in an interim custody order *did* constitute rights of custody under the Convention.<sup>123</sup> Why are interpretations so very different?

According to the Convention, there exist three ways a party can establish custody rights, including "by reason of an agreement having legal effect under the law of that state."<sup>124</sup> It would appear that a divorce and custody decree would be an agreement that would have legal effect under the law of the originating state. Why is a *ne exeat* clause, as part of the agreement, not recognized as conferring custody rights? The Convention defines custody rights as "the right to determine the child's place of residence."<sup>125</sup> A *ne exeat* clause specifically grants a party the right to limit his children's place of residence by *restricting the right to leave the country*. However, the court in *Gonzalez v. Gutierrez* states that this is not the case. According to the court, a *ne exeat* clause does not allow a parent to determine the child's place of residence, rather, it merely allows parents with access rights to "impose a limitation on the custodial parent's right to expatriate his child."<sup>126</sup> Therefore, it does not confer custodial rights, and the parent cannot compel a court to order the child's return.

One of the purposes of the Convention is to "ensure that parents do not manipulate jurisdictional differences to alter or avoid custodial agreements or orders that originated in the state in which the children lived prior to the dissolution of the marriage."<sup>127</sup> This is *precisely* what Gutierrez did by leaving Mexico. If she had stayed in Mexico, by the authority of her divorce decree, she would not have been allowed to leave Mexico with the children, and Gonzalez would have been able to visit both children three times a week, every other weekend, and for an

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<sup>121</sup> *Id.* at 954; *Croll v. Croll*, 229 F.3d 133, 143 (2d Cir. 2000).

<sup>122</sup> *See Fawcett v. McRoberts*, 168 F. Supp. 2d 595, 604-06 (W.D. Va. 2001).

<sup>123</sup> *Thompson v. Thompson*, [1994] 119 D.L.R. (4th) 253, 280-81.

<sup>124</sup> Convention, *supra* note 11, at 10506.

<sup>125</sup> *Gonzalez*, 311 F.3d at 949.

<sup>126</sup> *Id.*

<sup>127</sup> *Id.* at 950.

annual two-week vacation.<sup>128</sup> By fleeing Mexico and residing in the United States, Gutierrez successfully managed to avoid her custody agreement. Yet, the court dismisses this argument.<sup>129</sup> Taking the Convention's purpose into consideration, the court holds that Gutierrez was granted sole custody of her children, and allowing Gutierrez to remain in the United States does not result in any change to the custody provisions.<sup>130</sup>

As for policy considerations, the court takes away a convenient prophylactic measure for parents who do not receive custody. If the court were to recognize a *ne exeat* clause as mandating the return of children to their country of habitual residence, parents receiving access rights under their custody agreements would be able to rely on this simple measure to ensure that their access rights will not be interfered with. The Ninth Circuit's decision makes access rights illusory because it enables custodial parents simply to ignore *ne exeat* clauses and take the children away. A likely result of this decision will be an increase in litigation as parents with access rights will be forced to pursue a court order preventing the custodial parent from taking the children to another country.

### B. Uniformity

ICARA, which implements the Hague Convention, states that "[i]n enacting this chapter the Congress recognizes the need for uniform international interpretation of the Convention."<sup>131</sup> Yet, because the result of every case is dependent on domestic laws, the same case originating in two different jurisdictions could result in two different outcomes.

For example, Gonzalez's claim would have turned out differently if he were a Scottish citizen instead of a Mexican citizen. In *Fawcett v. McRoberts*, Jean Fawcett and Colin McRoberts divorced in Scotland, the birthplace of their son

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<sup>128</sup> *Id.* at 947.

<sup>129</sup> *See id.* at 950.

<sup>130</sup> *Id.* While the matter of actual custody may not have been altered, the rights of access, which are an integral part of the custody agreement, have been thwarted completely.

<sup>131</sup> 42 U.S.C. § 11601(b)(3)(B) (2002).

Travis.<sup>132</sup> The divorce decree stated that Travis was to live with McRoberts and Fawcett was to maintain contact with the children on the weekends.<sup>133</sup> Despite an order to the contrary, McRoberts left Scotland with Travis, and Fawcett instituted an action under the Convention.<sup>134</sup>

The court in *Fawcett* stated that, in order to answer the questions regarding Fawcett's custody rights, the court must determine whether these rights existed in the country where the child was "habitually resident" prior to his removal.<sup>135</sup> In Scotland, The Children (Scotland) Act was enacted in 1995. The Act grants parents multiple rights "to ensure they fulfill their parental responsibilities to their children."<sup>136</sup> These rights include the right to regulate the child's residence, and "if the child is not living with him, to *maintain personal relations and direct contact with the child on a regular basis*."<sup>137</sup> The court held that The Act "grants 'rights of custody' cognizable under the Hague Convention."<sup>138</sup> Comparing these cases, Gonzalez was allowed much more frequent visitation with his children, as authorized by his divorce decree, than Fawcett was to have with her son.<sup>139</sup> Yet, because Fawcett was under Scottish law, and had access to The Children (Scotland) Act, she was considered to possess custody rights for the purposes of the Convention.

### C. Court's Discretion

Part of the reasoning accounting for these non-uniform decisions is the amount of discretion the Convention gives the courts in deciding cases. Post-Convention decisions are inundated with examples of courts deciding a case on a factor that is not given consideration by the Convention.

For example, in *David S. v. Zamira S.*, the court finds in favor of the non-custodial petitioner, and orders the custodial respondent

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<sup>132</sup> *Fawcett v. McRoberts*, 168 F. Supp. 2d 595, 597 (W.D. Va. 2001).

<sup>133</sup> *Id.*

<sup>134</sup> *Id.* at 598.

<sup>135</sup> *Id.* at 600.

<sup>136</sup> *Id.* at 601.

<sup>137</sup> *Id.*

<sup>138</sup> *Id.* at 602.

<sup>139</sup> See *Gonzalez*, 311 F.3d at 947; *Fawcett*, 168 F. Supp. 2d at 598.

to return her child to the child's country of habitual residence.<sup>140</sup> The court focuses on two issues in making its decision. First, the court states, "Respondent's contention that the petitioner is not entitled under the Hague Convention to have their son returned, because he only had visitation ("access") rights and not custody, might have some merit but for the respondent's contemptuous conduct . . . ."<sup>141</sup> In this case, it is enough that the respondent violated a court order restricting her from leaving the country to disregard the Convention's distinction between custody rights and access rights.<sup>142</sup>

Second, the court states that respondent, who took the two children out of Canada, their country of habitual residence, and moved them to New York, has not rebutted the inference that these children continue to have substantial, meaningful connection to Ontario. Specifically, the children have numerous relatives (maternal and paternal) living in Ontario; friends and acquaintances of both parents reside there; there is a sizeable Orthodox Jewish community in Toronto in which the children can become involved; and the respondent continues to maintain an apartment in Toronto.<sup>143</sup>

Granted, while one of the affirmative defenses available to a respondent found to have taken children wrongfully is that they have become too settled in their new community and that return to their country of habitual residence would be too traumatic to them, the Convention never states that a respondent has to prove that the children no longer have ties to the community from which they

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<sup>140</sup> *David S. v. Zamira S.*, 151 Misc. 2d 630 (N.Y. Fam. Ct. 1991).

<sup>141</sup> *Id.* at 635. The court in *Janakakis-Kostun v. Janakakis* held that the custodial respondent must return her child to the petitioner for the same reasoning. 6 S.W.3d 843, 849 (Ky. Ct. App. 1999). The court, citing *Zamira*, reasoned, "*David S.* acknowledged that visitation rights may not always equate to custodial rights. The case nevertheless held that such a distinction was meritless where respondent, *i.e.*, the removing parent, engaged in 'contemptuous conduct' in removing the child from its habitual residence." *Id.*

<sup>142</sup> The Convention considers a removal to be "wrongful" when: 1) it is in breach of rights of custody and 2) at the time of the removal or retention those rights were actually exercised. . . . [a] court order prohibiting the respondent from leaving the country does not confer custody rights to a parent holding access rights, and it is a stretch to say that respondent breached custody rights with her removal of the child." Convention, *supra* note 11, at 10498.

<sup>143</sup> *Zamira*, 151 Misc. 2d at 636.

were taken.<sup>144</sup> Furthermore, if this was a requirement under the Convention, few respondents could rebut the inference of substantial, meaningful ties to the country of habitual residence because the petitioner in every case usually continues to reside there.

#### *D. Child's Best Interest*

From a policy standpoint, the court in *Gonzalez v. Gutierrez* relegates the bonds that exist between children and parents who only have visitation rights to the back burner. The court states that a "third and 'lesser' purpose of the Convention is to 'secure protection for rights of access.'"<sup>145</sup> It further concedes that its "interpretation of custody will undoubtedly result in some frustration of [Gonzalez's] visitation rights, as traveling to the United States from Mexico will involve a not inconsiderable amount of time and expense. Unfortunately, as a result, [Gonzalez] will undoubtedly be able to see far less of his children."<sup>146</sup>

The Convention finds that "international abduction or wrongful retention of children is harmful to their well-being."<sup>147</sup> Why is it harmful when a parent with access rights abducts a child (thereby interfering with the custodial parent's right to custody), but it is not harmful for a custodial parent to abduct a child (effectively obliterating the access rights)? Why does the interference with custody warrant a return of the child, but the interference with sometimes *daily* access rights does not? Are the courts suggesting that the loss of contact with a parent who has visitation rights is any *less* harmful to the child than the loss of contact with a parent with custody rights?

### **V. Conclusion**

On its surface, *Gonzalez v. Gutierrez* seems like a case that was correctly decided. In *Gonzalez*, a fairly unsympathetic petitioner allegedly abused his wife in front of his children, even after their divorce, and now seeks to have his children returned to

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<sup>144</sup> *See id.*

<sup>145</sup> *Gonzalez*, 311 F.3d at 946 (quoting Convention, *supra* note 11, at pmbl.).

<sup>146</sup> *Id.* at 950-51.

<sup>147</sup> 42 U.S.C. § 11601(a)(1) (2002).

him.<sup>148</sup> Few would be disturbed by the knowledge that the allegedly abusive Gonzalez will rarely see his children in the future. But the problem with *Gonzalez*, and the problem with the Convention as implemented by ICARA, is that not all petitioners are as menacing as Mr. Gonzalez.<sup>149</sup> What happens when the petitioner is a loving mother or father who misses his or her children and likely will never see them again due to financial constraints or other barriers that prevent them from traveling from country to country?

The way the Ninth Circuit and the Convention distinguish between custody rights and access rights disregards the importance of the parent-child relationship. The initial goal of the Convention - to order the return of children who have been wrongfully removed - is admirable. But why do we say that a parent who has custody of a child is entitled to that child's return, but a parent who may have daily visitation rights is not? Why is one type of relationship between parent and child valued more highly than another? Do the courts and the drafters of the Convention honestly believe that they are acting in the best interests of the child when they order his return to an adoption agency (because the agency has custody) after a biological parent (who has access rights) takes him out of the country?<sup>150</sup>

The Convention, and the courts in their interpretation of the Convention, deem custody rights superior to visitation rights.<sup>151</sup> One could make the argument that disrupting a child's custody arrangement is more detrimental than disrupting visitation rights because custody rights impact more aspects of a child's life. The custodial parent decides where and in what environment the child will live, what school the child will attend, and what acquaintances the child will keep. A parent's visitation rights rarely affect these aspects of the child's life. However, in a world where children may have no say in who gets custody of them, the court severely underestimates the relationship that may exist between the child

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<sup>148</sup> *Gonzalez*, 311 F.3d at 946.

<sup>149</sup> See *Fawcett v. McRoberts*, 168 F. Supp. 2d 595, 595 (W.D. Va. 2001); *Zamira*, 151 Misc. 2d at 630; *Janakakis-Kostun v. Janakakis*, 6 S.W.3d 843, 843 (Ky. Ct. App. 1999).

<sup>150</sup> Convention, *supra* note 11, at 10505-06.

<sup>151</sup> See *Gonzalez*, 311 F.3d at 950.

and the parent with visitation rights and fails to consider the potentially disastrous effects that separation from a parent with visitation rights may have on a child.

The court's treatment of the *ne exeat* clause is impractical and has serious policy ramifications. Why are we ignoring a specific order within divorce decrees that prohibits parents from leaving the country with their children? Is an agreement that has legal effect and in which both parties contemplated the terms any less persuasive than a court order? The court's decision indicates that, in order for a parent to secure his access rights, he will have to initiate a suit against his ex-spouse and specifically seek a court order that says essentially the exact same thing as a *ne exeat* clause.<sup>152</sup> The *ne exeat* clause is said to give a parent with access rights a 'veto power.'<sup>153</sup> But how helpful is that veto power when it loses all effect once a parent is out of the country? While the court acknowledges this 'veto power,' it fails to demonstrate how this power has any effect.

Courts around the world apply their own interpretation of the Convention to the cases involving international child abduction. While I disagree with the Ninth Circuit's treatment of Gonzalez because it disregards the *ne exeat* clause and treats custody rights as superior to visitation rights,<sup>154</sup> the court is not off base in its interpretation of the Convention. According to the Ninth Circuit, the Convention had the chance in 1996 to modify its treatment of custody rights and access rights and it chose not to make any changes. But the problem with the Convention is that it leaves *too much* open for interpretation. It purports to protect access rights and then provides no judicial remedy for them.<sup>155</sup> It strives for uniform application,<sup>156</sup> yet its language lends itself to several different interpretations. Until the Convention corrects these flaws, there will be no uniformity, and courts will continue to tailor the language of the Convention to help them reach desired results.

SARA J. BASS

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<sup>152</sup> See *Janakakis-Kostun*, 6 S.W.3d at 846.

<sup>153</sup> *Gonzalez*, 311 F.3d at 949.

<sup>154</sup> *Id.* at 950.

<sup>155</sup> See generally Convention, *supra* note 11.

<sup>156</sup> *Id.*